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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 851

ROWAN COTTON MILLS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. GILMER KORNER, JR.,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Rowan Cotton Mills Company, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above cause on January 10, 1944, affirming in part the decision of The Tax Court of the United States.

Opinions Below.

The opinion of The Tax Court of the United States is reported in 1 T. C. 865 (R. 22). The opinion of the court below is reported in 140 F. (2d) 277 (R. 72).

Jurisdiction.

The judgment of the court below was entered January 10, 1944 (R. 80). The jurisdiction of this Court is invoked

under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

These are set forth in the Appendix to this Petition, p. 14.

Statement of the Case.

The Revenue Act of 1926 (44 Stat. 9) conferred on the Commissioner of Internal Revenue the right to determine income tax deficiencies, and provided the manner in which that right should be exercised.[1] The same Act prescribed a limitation on that right. The statute said:

> Sec. 274. (f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the **Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year** * * *. (Emphasis supplied.)

That section has remained unchanged down to the present date.[2]

The Senate Finance Committee Report on the 1926 Revenue Bill, S. R. No. 52, 69th Cong. 1st Sess., pp. 37-38, speaking to the above section, said:

> But if he does elect to file a petition with the Board **his entire tax liability for the year in question** (except in case of fraud) is finally and completely settled by the decision of the Board * * *. Finality is the end

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[1] Sec. 274 of Revenue Act of 1926.

[2] 1928 Act, sec. 272(f); 1932 Act, sec. 272(f); 1934 Act, sec. 272(f); 1936 Act, sec. 272(f); 1938 Act, sec. 272(f); 1939 I. R. C., sec. 272(f).

sought to be attained by these provisions of the bill * * *. (Emphasis supplied.)

Treasury Regulations 69, Art. 1232 (promulgated under the 1926 Act) interpreted the law:

Art. 1232. Assessment of a deficiency.—

(5) * * * If the Commissioner mails to the taxpayer notice of a deficiency and the taxpayer files a petition with the Board, **the Commissioner is barred** from determining **any additional deficiency** for the same taxable year except in the case of fraud and except as provided in section 279.[3] (Emphasis supplied.)

The Regulations point to the only exceptions to the prohibition.

Every income tax Treasury Regulation since that date has contained the same interpretation.[4]

In light of the above legislative history, and prior to 1936, a number of court decisions affirmed and explained the principle and objective of the statute and regulations.[5]

In light of the prior re-enactments of the statute without change, and of the legislative history, and of the Regulations and Court decisions, on June 2, 1936, the Congress enacted the Revenue Act of 1936 (49 Stat. 1648) and in that Act imposed certain **additional income taxes.**

Among these additional income taxes were those designated as "Unjust Enrichment Taxes" or "Windfall Taxes".

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[3] Sec. 279 relates to "jeopardy assessments".

[4] Reg. 74, Art. 1171 (1928 Act); Reg. 77, Art. 1171 (1932 Act); Reg. 86, Art. 272-1 (1934 Act); Reg. 94, Art. 272-1 (1936 Act); Reg. 101, Art. 272-1 (1938 Act); Reg. 103, Sec. 19.272-1 (Int. Rev. Code); Reg. 111, Sec. 29.272-1 (Oct. 28, 1943).

[5] Among such decisions are: *Bankers Reserve Life Co.* v. *U. S.*, 44 F. (2d) 1000 (1930), cert. den. 283 U. S. 836; *Com'r* v. *Wilson*, 60 F. (2d) 501 (1932), aff'g 23 B.T.A. 644; *Skaneateles Paper Co.*, 29 B.T.A. 150 (1933). The principle was also vigorously restated on April 20, 1943, in *Agnes McCue*, 1 T. C. 986, bot. 987.

They were imposed by sec. 501, Title III of the 1936 Act. Sec. 503 of that Act (now sec. 702, I. R. C.) provided:

> Sec. 503(a). All provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this title, be applicable with respect to the taxes imposed by this title * * *.

Title I, above referred to, contains sec. 272(f) hereinabove quoted.

Pursuant to the 1936 Act, the Department promulgated Treasury Regulations 94, **governing determination of income tax deficiencies under that Act** and, in Art. 272-1, said:

> If the Commissioner mails to the taxpayer notice of a deficiency, and the taxpayer files a petition with the Board within the prescribed period, the Commissioner is barred from determining any additional deficiency for the same taxable year * * *.

That was the Regulation which had obtained for a prior period of ten years, as above noted.

The Internal Revenue Code comprehends all the taxes entitled "Internal Revenue Taxes". It subdivides those taxes into taxes over which the Board **has** jurisdiction and those over which the Board does **not** have jurisdiction. Subtitle A of the Code embodies all those "Taxes subject to the Jurisdiction of the Board of Tax Appeals" and then lists them (p. 1f) as follows:

Chapter 1. Income Tax ..... p. 1
Chapter 2. **Additional Income Taxes** p. 104
Chapter 3. Estate Tax ..... p. 118
Chapter 4. Gift Tax ..... p. 144

Chapter 2 of the Code (p. 104) is entitled "Additional Income Taxes" and in that chapter are listed the following **"Additional Income Taxes"**:

> Personal Holding Company Tax.
> Excess-Profits Tax.

Excess-Profits Tax on Navy Contracts.
Unjust Enrichment Tax.

The Chapter of the Code devoted to Income Tax contains the basic administrative enactments, and contains the basic jurisdictional and procedural provisions.

The Chapters devoted to "**Additional Income Taxes**"[6] contain no jurisdictional or procedural provisions except by reference to the jurisdictional and procedural sections of the basic enactments in the "income" Chapter.

On May 2, 1941, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued a document entitled "Internal Revenue Administrative Code."[7]

That Code proposed certain **changes** to be made in the law. The statement (at p. v) is as follows:

> The **changes** which each section of the Code **would make** in the corresponding section of the Internal Revenue Code are indicated by brackets and italics. Brackets signify that the matter enclosed therein is to be omitted, and **italics identify new matter.** (Emphasis supplied.)

One of the **changes** proposed by the Treasury Department to be made is found in Subchapter B entitled "Assessment and Collection of Deficiencies", and in that subchapter appears the following (brackets indicating omissions, and

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[6] Note the caption of each page of the Code on Unjust Enrichment Taxes—i.e., caption of pages 113, 115, 117.

[7] U. S. Government Printing Office, Washington: 1941. The document states (p. v): "The preparation of this Code was commenced in the Treasury Department in 1937 at the behest of Roswell Magill, then Under Secretary of the Treasury, and the late Herman Oliphant, then General Counsel for the Department. Roger J. Traynor, then consulting expert, assisted by John M. Maguire, then consulting expert, and Stanley S. Surrey, assistant legislative counsel, Treasury Department, supervised the work on this Code, which was performed by a staff of attorneys from the General Counsel's Office."

italics indicating **new matter constituting changes** which would be made in the law):

> **Sec. 2604. Restrictions on Assessment and Future Deficiency Notices.**
>
> (b) [(f)] FURTHER DEFICIENCY *NOTICES* [LETTERS] RESTRICTED.—If the Commissioner has mailed to the taxpayer [E-executor; G-donor] *a* notice of [a] deficiency [I, G-as provided in subsection (a) of this section; E-as provided in subsection (a)], and the taxpayer [E-executor; G-donor] files a petition with the Board within the time prescribed in *section 2603(a)* [such subsection], the Commissioner shall have no right *with respect to the same tax*[7a] to determine any additional deficiency *for the same taxable year* * * *. (Italics *not* supplied.)

The law was not changed, nor were the Regulations changed. The law was not amended so as to make it read as the respondent in the instant case (who was the one who proposed the *change* to be made) contends it should now be read.

Respondent now contends that the statutory prohibition against "any additional deficiency" means only "with respect to the same tax", thereby writing into the statute words which do not appear therein—and which change and amend both the language and the meaning of the statute.

The Unjust Enrichment Tax is an income tax. *Cincinnati Rubber Mfg. Co.*, 46 B. T. A. 453 (1942), and decisions below in the instant case.

In *Cincinnati Rubber Mfg. Co., supra*, the **taxpayer contended** that since the unjust enrichment tax is not included under Title I, Income Tax, but is under a separate title,

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[7a] *Added* to show clearly that the restriction as to the determination of an additional deficiency is limited to *the same tax for* which the previous deficiency was determined and for the same taxable year or, in the case of estate taxes, for the same transfer of net estate. (Italics supplied.)

Title III of the 1936 Act, it is a tax of a different character from the Income Tax.[8] The **respondent contended** that it was **not** a tax of a different character, but **was a tax of the same kind**, viz., an additional income tax. The **respondent** argued in his brief: "It is an additional Federal income tax based on net income from certain sources. The fact that it is captioned under a separate title * * * is immaterial. The reason that this tax was not interwoven with those imposed under Title I and IA is obvious. It is a tax administered by the Income Tax Unit of the Bureau and is in every material aspect an income tax"[9] (R. Append. B, p. 6-11).

The Board in its decision sustained the contention of the Commissioner and rejected the contention of the taxpayer. The decision below in the instant case is in direct conflict with that decision.

* * * * * * *

In light of all the foregoing, the following facts are to be considered:

Petitioner filed a timely income and excess profits tax return for the **year 1935.**

On June 15, 1937, petitioner filed its return of additional income taxes—unjust enrichment taxes.

On September 13, 1937, the Commissioner determined a deficiency in income and profits taxes in the respective amounts of $9,192.34 and $3,385.61, and mailed a statutory deficiency notice thereof to petitioner.

On December 10, 1937, petitioner filed a timely petition in the Board of Tax Appeals. Respondent filed answer on February 7, 1938, and raised an affirmative plea, claiming

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[8] The respondent now makes that contention in the instant case.

[9] The petitioner in the instant case makes the same contention that the Commissioner made in the *Cincinnati Rubber Mfg. Co.* case.

deficiencies in income and profits taxes in excess of those determined in the deficiency notice.

On May 27, 1938, the parties, after negotiations, entered into an "Agreement to Stipulate" which, inter alia contained the stipulation that:

> "It is also agreed and understood that the **petitioner's taxable net income for 1935** is $190,330.85 * * *.
>
> "All other issues are waived and no new issues are to be raised.
>
> "This settlement when approved shall definitely close the Federal income tax matters of Rowan Cotton Mills Company for the year 1935 * * *" (Ex. 16).

The settlement was approved and, pursuant to the above agreement, on June 24, 1938, the parties executed and filed a stipulation in the Board fixing the deficiencies in income and profits taxes for the year 1935 (in accordance with their agreement) at $14,863.52 and $5,447.86 respectively (Ex. 11).

On June 25, 1938, the Board entered its decision and Order fixing the deficiencies for the said year 1935 (Ex. 12). Neither party appealed the Board's decision and it became final in due course (R. top 44).

About three years later (on May 12, 1941) the Commissioner purported to determine an additional deficiency for the year 1935, and advised petitioner that this deficiency was for an Unjust Enrichment Tax imposed by Title III of the 1936 Act, and that such tax "**is in addition to all other taxes on net income**" (R. Appen. C., top p. 20). The Commissioner mailed a registered notice to petitioner proposing a tax deficiency of $33,969.97, and asserting a penalty of 20%, alleging that the Windfall Tax Return was not filed on time (R. 18-19).

Petitioner filed a timely appeal in the Board of Tax Ap-

peals and contended that the Commissioner had no right to determine any additional income tax deficiency for the same year 1935, under the circumstances. On June 2, 1942, petitioner filed motion in the Board that the hearing in this cause be limited, in the first instance, to the question of whether the Commissioner had the right to determine any additional deficiencies for the year 1935. The motion was granted (R. 21-22). The hearing was limited to that issue. Petitioner introduced evidence establishing the facts set out hereinabove. It introduced the Windfall Tax Return in evidence showing that it was filed on June 15, 1937,[10] and introduced in evidence a letter of the Collector of Internal Revenue, with whom that return was filed, showing that the extended time granted for filing such return was to June 15, 1937 (Ex. 15).

After the said hearing the case was restored to the general calendar for hearing on the issue as to the merits of the proposed tax deficiency. The taxpayer elected to stand on its plea to the right of the Commissioner, and of the Board, to determine any additional deficiency for the year 1935. A Division of the Board (then the Tax Court) concluded that the Commissioner was not barred from determining and assessing the deficiency, and entered an order deciding that there is a deficiency for the year 1935 in the amount of $33,969.97, plus a delinquency penalty of $6,793.99 (R. p. 22 and p. 29).

Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit. That court affirmed the decision of the Tax Court as to the deficiency in tax, but reversed and remanded the cause on the issue as to the penalty—which latter point is not involved in this Petition for Certiorari.

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[10] The Board found that it was filed on that date (R. Opinion by Judge Smith, top p. 26).

Questions Presented.

When the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of section 272 [11] and the taxpayer has filed a petition with the Board within the time prescribed in such subsection, and the decision of the Board has become final in that appeal, has the Commissioner the right to determine any additional deficiency in income tax, under section 501 [12] in respect of the same taxable year?

Specification of Errors to Be Urged.

The court below erred:

1. In holding that the windfall tax, although an income tax, is a separate and distinct tax from the income tax.

2. In holding that the provisions of law, contained in sec. 272(f), with respect to taxes imposed by Title I of the statute, are not applicable and binding upon the Commissioner with respect to the taxes imposed by Title III of the statute.

3. In holding that the prohibition against the determination of any additional deficiencies in respect of the same taxable year, contained in sec. 272(f), do not prohibit the determination of a deficiency of additional income taxes, under section 501, in respect of the same taxable year.

4. In holding that the statute does not require that notice of determination of a deficiency in income taxes under Title I of the statute must also embrace notice of a determination of a deficiency in income taxes under Title III of the statute, or vice-versa.

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[11] Section 272 I. R. C.

[12] Section 701 I. R. C.

5. In holding that section 501 of Title III of the statute provides an administrative procedure for the determination of income taxes under that section, separate and distinct from, and independent of, the administrative procedure for the determination of income taxes under Title I of the statute.

6. In affirming the decision of The Tax Court and holding that the Commissioner had the right to determine an additional deficiency in income taxes under section 501 of the statute, notwithstanding that approximately four years previously he had mailed to the taxpayer notice of a deficiency in income taxes as provided in subsection 272(f), and that the taxpayer had filed a petition in the Board within the time prescribed in that subsection, and the Board's decision on that petition had become final; and in affirming the decision of The Tax Court that there is a deficiency in taxes in the amount of $33,969.97.

Reasons for Granting the Writ.

This case involves the judicial interpretation of a statute which, petitioner contends, is phrased in clear and unambiguous language.

Petitioner contends that the statute means exactly what it says. It says that when a deficiency notice has been mailed to the taxpayer and appeal taken therefrom to the Board, the Commissioner shall have no right to determine "any additional deficiency" in respect of the same year.

Petitioner contends that the clear wording of the section **cannot be construed** as if it read "* * * the Commissioner shall have no right **with respect to the same tax** to determine any additional deficiency for the same taxable year."

Petitioner contends that the decisions below construe the statute as if contained the added phrase "with respect to

the same tax". And the petitioner points to the fact that the Secretary and the Commissioner have recognized this fact by the change offered by them in their proposed Administrative Code, to which reference has been made. The proposal to insert that added phrase was accompanied by a note of explanation which stated that the phrase, "with respect to the same tax," was:

> "**Added** to show clearly that the restriction as to the determination of an additional deficiency is limited to the **same tax** for which the previous deficiency was determined and for the same taxable year * * *." (Emphasis supplied.)

Petitioner contends that the interpretation of that section as if it contained that added phrase is negatived, not only by the plain and unambiguous language of the statute itself, but also by the legislative history of the section, its interpretation by the Treasury Department for many years in Treasury Regulations, and that such interpretation is in conflict with other decisions of the Board and the Courts.

Petitioner contends that the Commissioner's action is in effect to amend the statute without legislative action and that this is a novel and test case for that purpose.

Petitioner contends that the interpretation of the section should be approached with no desire to construe legislation so as to accomplish that which may be deemed to be a worthy result, but in the desire to ascertain what Congress has enacted rather than what the Commissioner wishes it had enacted.

The question here is new and of general importance because this case is the first to define the right of the Commissioner on this point. The statute has not been construed by this Court in any similar case.

Since the statutory provisions have wide application, and since the question is therefore likely to recur frequently, it is

a matter of general importance in the administration of the revenue laws that the issue be authoritatively resolved.

Conclusion.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

J. GILMER KORNER, JR.,
404 Transportation Building,
Washington 6, D. C.,
Attorney for Petitioner.

March, 1944.